



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: American Cyanamid Company

File: B-232200

Date: October 11, 1988

DIGEST

Contracting officer's determination to set aside 50 percent of procurement for small business is reasonable where it is supported by prior procurement history and an informal market survey.

DECISION

American Cyanamid Company, a large business, protests the Defense Logistics Agency's issuance of invitation for bids (IFB) No. DLA400-88-B-2965 as a partial small business set-aside. American Cyanamid contends that the contracting officer's determination to restrict 50 percent of the procurement to small businesses was improper because there was no reasonable expectation that bids would be received from at least two responsible small business concerns and that contract award would be made at a reasonable price, as required by Federal Acquisition Regulation (FAR) § 19.502-3(a)(3).

We deny the protest.

The IFB was issued May 9, 1988, for indefinite quantities of chemical safety lights. American Cyanamid alleges that it holds exclusive patent rights that are critical to the production of the chemical safety lights. The protester also states that it has not licensed any other manufacturer to use its patented technology, nor is it aware of any alternative technology that is in current use for producing the lights. Therefore, according to the protester, the partial set-aside is improper since the contracting officer could not have reasonably concluded that there exists an adequate number of small businesses capable of supplying the lights.

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We addressed the identical issue regarding similar chemical light products in our decision American Cyanamid Co., B-230044 et al., Apr. 7, 1988, 88-1 CPD ¶ 350. In that decision, we found the contracting officer's determination to set-aside 50 percent of the procurements was reasonable because, as in this case, it was supported by an analysis of past procurements and by an informal market survey. We also concluded that the procurements should be allowed to go forward despite American Cyanamid's patent infringement claims because 28 U.S.C. § 1498 provides patent holders a remedy for infringement while saving the government from having its procurements delayed pending litigation of such disputes. Id.

The protester believes the circumstances surrounding this protest are different from those in its earlier protest. According to American Cyanamid, in this case, its own review of the small businesses which responded to the solicitation indicates that they are incapable of supplying the agency's requirements because three of the four small businesses are not known manufacturers of chemical light devices. In view of this information, the protester argues, the contracting officer could not have made an informed business judgment justifying the set aside.

The decision to set aside a procurement for small business is basically a business judgment within the broad discretion of the contracting agency, so that we will not question a decision to set aside a particular procurement unless a clear showing is made that the agency abused its discretion. Waste Management, Inc., B-225403.4, Jan. 30, 1987, 66 Comp. Gen. ___, 87-1 CPD ¶ 103.

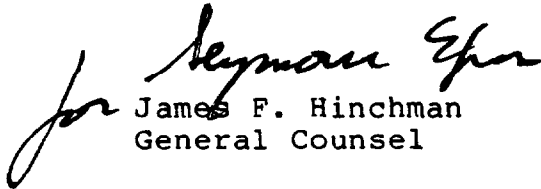
The record indicates that a total of five small businesses informed the agency that they could supply chemical light products and four submitted bids in response to this solicitation. We believe this adequately supports the contracting officer's determination under FAR § 19.502-3 that the procurement was appropriate for a partial set-aside since there was a reasonable expectation that offers would be submitted by one or more responsible small business concerns and four offers were in fact submitted.

Concerning the protester's allegations that the small businesses lacked experience and the ability to produce the items, agencies are not required to make what amounts to a responsibility determination before determining to set aside a procurement. While the standards of responsibility enunciated in the regulations may be relevant in making a set-aside determination, the agency only is obligated to

make an informed business judgment, which it did here, that there is a reasonable expectation of receiving acceptably priced offers from a sufficient number of responsible small business. Id. Moreover, the solicitation did not state that prior experience as a supplier of chemical light products was required and, in any event, pre-award surveys conducted in connection with a prior procurement produced satisfactory ratings on small businesses competing with American Cyanamid.

We view the protester's allegations concerning the small businesses' lack of experience and infringement of American Cyanamid's patents as involving matters of responsibility since the allegations essentially relate to the capability of the firms to perform. We generally do not review protests which directly or indirectly question the responsibility of other firms. Thermionics Laboratory, Inc., B-196074, Oct. 19, 1979, 79-2 CPD ¶ 273.

The protest is denied.

for
James F. Hinchman
General Counsel